

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHNELL ALLEN, JR.,

Defendant-Appellee.

UNPUBLISHED

May 10, 2005

No. 249788

Genesee Circuit Court

LC No. 90-043372-FC

Before: Murphy, P.J., White and Kelly, JJ.

MEMORANDUM.

Plaintiff appeals as on leave granted, after remand from the Supreme Court, the order granting defendant's motion for relief from judgment. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted by jury of second-degree murder and felony-firearm in the death of Johnny McMullen, the boyfriend of defendant's former girlfriend and mother of defendant's children. Defendant's conviction was affirmed on appeal. The circuit court granted defendant's motion for relief from judgment, finding that the trial judge had erroneously excluded evidence regarding defendant's state of mind as hearsay, and defendant was denied the effective assistance of appellate counsel.

A trial court's grant of a motion for relief from judgment is reviewed for abuse of discretion. *People v Osaghae*, 460 Mich 529, 534; 596 NW2d 911 (1999); *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001).

A defendant has the burden of establishing entitlement to relief under MCR 6.508(D). Except for jurisdictional defects, if an issue could have been raised on appeal, defendant must demonstrate good cause for failure to raise the issue, and actual prejudice. To establish actual prejudice in a conviction following trial, defendant must show that but for the alleged error, the defendant would have had a reasonably likely chance of acquittal, MCR 6.508(D)(3)(i), or the irregularity was so offensive to the maintenance of a sound judicial process that the conviction cannot be allowed to stand. MCR 6.508(D)(3)(iii).

The circuit court found that the trial judge erred in excluding evidence of what defendant heard about decedent's violent propensities because the evidence was offered to show defendant's state of mind, and not for the proof of the matter offered. In this regard, the circuit

court was correct. The evidence should have been admitted for the reasons stated by the circuit court. We conclude, however that the court erred in concluding that defendant demonstrated the requisite prejudice. Defendant was permitted to introduce ample evidence that he had been made aware that decedent had been physically abusive to Hunter and had been “messing with” the children, and that Hunter wanted to get a gun to protect herself. The additional evidence would have been cumulative.

Defendant also fails to establish an irregularity that is offensive to the maintenance of justice. Failure to raise on appeal an erroneous evidentiary ruling that was unlikely to affect the outcome of the case did not deprive defendant of the effective assistance of appellate counsel. *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995).

Reversed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly